

6450-01-P

DEPARTMENT OF ENERGY

Memorandum of Understanding Between the United States Fish and Wildlife Service, Department of the Interior, and the Department of Energy Regarding Implementation of Executive Order 13186, "Responsibilities of Federal Agencies to Protect Migratory Birds."

AGENCIES: Department of Energy and United States Fish and Wildlife Service, Department of the Interior.

ACTION: Notice of availability of Memorandum of Understanding.

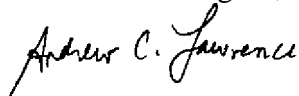
SUMMARY: The Department of Energy (DOE) and the Department of the Interior (DOI), United States Fish and Wildlife Service (FWS) have entered into a Memorandum of Understanding (MOU), effective August 3, 2006. The purpose of the MOU is to address how both Parties may cooperatively handle migratory bird protection and conservation in accordance with the requirements of the Migratory Bird Treaty Act (MBTA) and Executive Order (EO) 13186.

FOR FURTHER INFORMATION CONTACT: John Stirling, U.S. Department of Energy, 1000 Independence Avenue, S.W. (Room 3G-092), Washington, D.C. 20585, 202-586-2417

SUPPLEMENTARY INFORMATION: The MOU addresses how DOE and DOI may cooperatively handle migratory bird protection and conservation and ensure that DOE operations are consistent with the requirements of the Migratory Bird Treaty Act (MBTA) and Executive Order (EO) 13186, "Responsibilities of Federal Agencies to Protect Migratory Birds." EO 13186 specifically directs Federal agencies whose actions have, or are likely to have, a measurable negative impact on migratory bird populations, to incorporate migratory bird conservation measures into their activities. The MOU serves to strengthen migratory bird protection and conservation through enhanced collaboration between DOE and FWS, and fulfills DOE's obligation under EO 13186. The MOU identifies specific areas in which cooperation between DOE and FWS will substantially contribute to the conservation and management of migratory birds and their habitats. The MOU establishes protocols to provide the necessary guidance for DOE to incorporate migratory bird protection and conservation more fully into its programs in accordance with EO requirements.

The complete text of this MOU is available for view on the following Department of Energy web site: www.eh.doe.gov/oepa/data

Issued at Washington, D.C. October 30, 2006



Andrew C. Lawrence
Director
Office of Nuclear Safety and Environment
Office of Health, Safety and Security U.S.
Department of Energy

**Memorandum of Understanding
Between the United States Department of Energy
And the United States Fish and Wildlife Service
Regarding Implementation of Executive Order 13186,
"Responsibilities of Federal Agencies to Protect Migratory Birds"**

Prepared by:

**United States Department of Energy
and
United States Fish and Wildlife Service**

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**Memorandum of Understanding
Between the United States Department of Energy
and the United States Fish and Wildlife Service
Regarding Implementation of Executive Order 13186,
"Responsibilities of Federal Agencies to Protect Migratory Birds"**

This Memorandum of Understanding (MOU) is entered into by and between the United States Department of Energy (DOE) and the United States Department of the Interior, Fish and Wildlife Service (FWS), herein collectively referred to as the Parties.

A. Purpose

This MOU meets the requirements under Section 3 of Executive Order 13186 (66 FR 3853, January 17, 2001), concerning the responsibilities of Federal agencies to protect migratory birds. The Executive Order directs executive departments and agencies to take certain actions to protect and conserve migratory birds. The purpose of this MOU is to strengthen migratory bird conservation through enhanced collaboration between DOE and the FWS, in coordination with state, tribal, and local governments. This MOU does not remove the Parties' legal requirements under the Migratory Bird Treaty Act and does not authorize the take of migratory birds. This MOU identifies specific areas in which cooperation between the Parties will substantially contribute to the conservation and management of migratory birds and their habitats.

B. Authority

This MOU is entered under the provisions of the following laws and other authorities available to the Parties:

Migratory Bird Treaty Act (16 U.S.C. §§ 703-711)
Bald and Golden Eagle Protection Acts (16 U.S.C. §§ 668-668d)
Fish and Wildlife Coordination Act (16 U.S.C. §§ 661-666c)
The National Environmental Policy Act of 1969 (42 U.S.C. §§ 4321-4347)
The Endangered Species Act of 1973 (16 U.S.C. §§ 1531-1544) Executive
Order 13186 (66 FR 3853)

C. Missions of Both Parties

DOE

The mission of DOE is to enhance national security through fostering domestic energy production, energy efficiency, and the development of alternative energy sources; ensuring the safety and integrity of the Nation's nuclear weapons; advancing nuclear non-proliferation; cleaning up the environmental legacy of the Cold War and permanently disposing of radioactive waste; and leading in the physical sciences and advancing the biological, environmental, and computational sciences.

The National Nuclear Security Administration (NNSA) is a semi-autonomous agency within DOE reporting directly to the Deputy Secretary of Energy. NNSA has oversight responsibility for several Department of Energy field sites that would be impacted by this MOU. All responsibilities described in this MOU that pertain to DOE also apply to NNSA.

FWS

The mission of the FWS is to work with others to conserve, protect, manage, and enhance fish, wildlife, plants, and their habitats for the continuing benefit of the American people. The FWS Migratory Bird Program serves as a focal point in the United States for policy development and strategic planning, program implementation, and evaluation of actions designed to conserve migratory birds and their habitats.

The FWS is legally mandated to implement the conservation provisions of the Migratory Bird Treaty Act (16 U.S.C. § 703 et seq.), which includes responsibilities for migratory bird population management (e.g., monitoring), habitat protection (e.g., acquisition, enhancement, and modification), international coordination, and regulations development and enforcement.

D. Statement of Mutual Interest and Benefit

DOE manages approximately 2.28 million acres of land, of which a substantial amount is undeveloped and includes wetlands, deserts, and forested mountain areas that provide habitat for a variety of wildlife, including many species of migratory birds. DOE takes its environmental stewardship role seriously and advocates a proactive management stance toward the natural environment. Migratory birds are a part of the natural and man-made environment at many DOE sites, and proper management of migratory birds on DOE lands fosters healthy and diverse species. DOE recognizes that some of its activities have the potential to affect migratory birds (e.g., operation of transmission lines, power poles, and waste-water retention and evaporation ponds; management of invasive weeds; and various construction activities). To lessen the impacts on migratory birds, whenever appropriate and feasible, DOE sites utilize avian-friendly transmission lines and power poles that are designed to minimize bird collisions and electrocutions; sponsor avian workshops with federal and private entities on minimizing electrocutions and collisions on electric utility structures; monitor waste water retention and evaporation ponds and when necessary utilize netting or noise devices to discourage migratory bird use; utilize invasive weed eradication practices that pose minimal risks to migratory birds; reseed areas with desirable plant species to encourage migratory bird use; monitor construction projects and when feasible schedule construction activities after nesting seasons; and develop habitat management plans for various bird species including bald eagle, Mexican spotted owl, wood stork, and southwestern flycatcher. In addition, DOE routinely utilizes the National Environmental Policy Act (NEPA) process to evaluate the potentially significant environmental impact of proposed actions, including impacts to migratory birds, and to examine alternatives to those actions.

Both Parties have interests and responsibilities in the conservation and management of America's natural heritage and natural resources. The Parties agree that migratory birds are important components of biological diversity, that their conservation and management will help to sustain ecological integrity, and they serve the growing public demand for outdoor recreation, conservation education, wildlife viewing, and hunting opportunities.

This MOU is necessarily general due to the diversity of programs throughout the DOE site complex.

In consideration of these premises, the Parties agree as follows:

E. Obligations of Both Parties

To the extent allowed by law, subject to the availability of appropriations and within Administration budgetary limits, and in harmony with DOE and FWS missions and capabilities, both Parties shall:

1. Protect, restore, enhance and manage habitats of migratory birds, to the fullest extent practicable. This includes:
 - a. Implementing management practices that minimize or avoid adverse impact on migratory bird populations, and their nesting, migration, or over-wintering habitats.
 - b. Working collaboratively with Federal and State agencies to identify, protect, restore, enhance, monitor, and manage important migratory bird areas.
 - c. Preventing or abating the pollution or detrimental alteration of the environment of migratory birds.
2. Promote collaborative inventorying, monitoring, management studies, research, and information exchange related to the conservation of migratory birds and management of their habitats. This includes:
 - a. Sharing inventory, monitoring, research, and study data for breeding, migrating, and wintering populations and habitats in a timely fashion with national repositories (such as BBIRD and MAPS); other Federal and State agencies, as appropriate; and among DOE offices, as practicable.
 - b. Collaborating, as practicable, in management studies and research to identify the habitat conditions needed by migratory bird species, sustain populations of co-existing species, and understand the effects of management activities on them,
 - c. Developing partnerships with other agencies and non-Federal entities to further bird conservation, as practicable.

3. Identify and pursue training opportunities for appropriate employees in methods of monitoring bird populations for the purposes of inventorying, measuring demographic parameters, and evaluating the effects of land management activities; and implementing land use practices that promote bird conservation.
4. Provide representation on the Council for the Conservation of Migratory Birds.
5. Periodically evaluate the measures taken under this MOU to protect, restore, and enhance migratory bird resources, including avoiding or minimizing take of migratory birds and, if necessary, suggesting revisions to the FWS to ensure that the most effective conservation measures are employed. These efforts will be coordinated through the FWS's Division of Migratory Birds.

F. Obligations of the DOE

To the extent allowed by law, subject to the availability of appropriations and within Administration budgetary limits, and in harmony with the Department's missions and capabilities, the DOE shall:

1. Integrate migratory bird conservation principles, measures, and practices into agency activities. Avoid or minimize, to the extent practicable, adverse impacts on migratory bird resources when conducting agency actions, in compliance with, and supporting the purposes of, the Migratory Bird Treaty Act, the Bald and Golden Eagle Protection Act, the Endangered Species Act, NEPA, and other applicable statutes.
2. Protect, restore, enhance, and manage habitats of migratory birds, to the fullest extent practicable. This includes:
 - a. Reviewing FWS migratory bird lists and/or conducting field surveys to determine which species occur or are likely to occur on DOE properties;
 - b. Developing habitat management plans to benefit migratory birds and other species consistent with individual DOE site programs;
 - c. Restoring and enhancing migratory bird and other species' habitat consistent with individual DOE site programs. This may include restoring wetland habitat, controlling invasive species (both plant and animal), reseedling with desirable plant species, etc.;
 - d. Preventing and abating the pollution or detrimental alteration of migratory bird habitat by:

- i. Properly managing hazardous wastes associated with site activities by containerizing, storing, transporting, or burying wastes in accordance with applicable regulations and guidelines;
 - ii. Timely remediation of areas that have been contaminated with hazardous materials/wastes;
 - iii. Using controlled burning to manage invasive weeds; and
 - iv. Using physical, mechanical, and/or herbicidal treatments that pose minimal risks to migratory birds to control invasive weeds; and
- e. Ensuring that migratory bird protection and conservation is considered in NEPA project reviews by:
 - i. Identifying and evaluating the effects of proposed projects (actions) on migratory birds;
 - ii. Minimizing adverse impacts on migratory birds by evaluating all reasonable alternatives of a proposed action; and
 - iii. Providing reasonable measures within a proposed action to eliminate or minimize adverse effects on migratory bird species. If DOE determines that significant adverse effects to migratory birds cannot be avoided or minimized, the DOE site will notify the FWS prior to the start of the proposed action.
- 3. Incorporate migratory bird habitat and population management objectives and recommendations into planning processes, including DOE site planning documents, as appropriate, in cooperation with federal, state, and tribal agencies.
- 4. Promote appropriate programs and recommendations of comprehensive migratory bird planning efforts such as Partners in Flight, United States Shorebird Conservation Plan, North American Waterfowl Management Plan, North American Colonial Waterbird Conservation Plan, and other planning efforts, within established authorities and in conjunction with the adoption, amendment, or revision of agency management plans and guidance.
- 5. Obtain permits from the applicable FWS Regional Migratory Bird Permit Offices for the take of migratory birds pursuant to requirements of 50 CFR §§ 10, 13, 21, and 22. Doing so shall serve as advance notice to the FWS that DOE is conducting an action that is likely to result in the take of migratory birds.
- 6. Identify where take reasonably attributable to DOE actions, other than permitted activities referenced in paragraph 5 above, could affect migratory bird populations or habitats, focusing first on species of concern, their habitats, and key risk factors associated with DOE activities (e.g., installation of power poles and transmission

lines, construction projects, invasive weed species eradication, and waste treatment that utilizes retention and evaporation ponds).

- a. With respect to those actions so identified, and where appropriate and feasible, DOE shall develop and use principles, standards, and practices that lessen the amount of takings. This includes:
 - i. Utilizing avian-friendly transmission lines and power poles;
 - ii. Scheduling construction activities around migratory bird nesting seasons;
 - iii. Utilizing netting covers on waste-water retention and evaporation ponds;
 - iv. Sponsoring avian workshops on minimizing electrocutions and collisions on electric utility structures; and
 - v. Following the recommendations and suggested practices in wind turbine and powerline guidelines published by FWS and the Avian Power Line Interaction Committee, respectively, to minimize impacts from existing facilities and in the construction of new utility and energy systems and associated infrastructure.
 - b. DOE shall inventory and monitor bird populations and habitats, as appropriate and feasible, to facilitate decisions about the need for, and effectiveness of, conservation efforts.
7. Recognize and promote the ecological, economic and recreational values of migratory birds into outreach and educational materials and activities.
 8. Advise the public of this MOU through a notice published in the *Federal Register*.

G. Obligations of the FWS

Unless otherwise specified, the following activities will be coordinated through the Regional Migratory Bird Program.

To the extent permitted by law and subject to the availability of appropriations and Administration budgetary limits, and to the extent that the following obligations are in harmony with agency missions and capabilities, the FWS shall:

1. Work to identify special migratory bird habitats (e.g., migration corridors, stop-over habitats, nesting habitats) under the stewardship of DOE.

2. Improve cooperation and coordination with DOE and other Federal agencies, State agencies, universities, and independent nongovernmental organizations involved in monitoring and research efforts that provide reliable information on the status and trends of migratory bird populations.
3. Provide assistance, at the request of DOE, to identify particular species and habitats that would benefit most from particular agency land management decisions.
4. Initiate new or provide greater support for long-term research and monitoring programs of birds on DOE and adjacent lands.
5. The Division of Migratory Birds shall keep DOE informed of the latest directions in bird conservation that might affect DOE activities, lands, or policies, by providing information on:
 - a. Changes to the Migratory Bird Treaty Act and its regulations and procedures, or other acts and their regulations affecting migratory birds;
 - b. Population trends of species that might be affected by activities on DOE lands;
 - c. Changes to the list of Birds of Conservation Concern;
 - d. Changes in, updates to, or additions to national and regional bird conservation plans (e.g., Partners in Flight bird conservation plans, United States Shorebird Conservation Plan, North American Waterbird Conservation Plan, and the North American Waterfowl Management Plan); and
 - e. Updated protection measures for reducing human-caused bird mortality as new information becomes available.
6. Encourage widespread use of the best available scientific information in the management of migratory bird populations.
7. Conduct informational and educational programs for DOE oriented toward migratory bird conservation.

H. Termination of MOU; Miscellaneous Provisions It

is mutually agreed and understood that:

This MOU in no way alters or diminishes any Party's obligations or responsibilities under any statute or other legal authority.

1. Either Party may terminate this MOU, in whole or in part, at any time before the date of expiration by providing the other Party 30 days written notice to that effect.
2. Changes to this MOU shall be made by means of written modification(s) bilaterally executed by the Parties. This instrument in no way alters a Party's obligations to conduct environmental analyses, including compliance with NEPA requirements.
3. This MOU in no way restricts either Party from participating in similar activities with other public or private agencies, governments, organizations, or individuals.
4. Documents furnished to a Party under this MOU may be subject to the Freedom of Information Act (FOIA, 5 U.S.C. § 552). A Party shall not release documents originating in the other Party to a FOIA requester. Rather, the Party shall forward such document(s) to the originating Party for review, determination, and response directly to the requester.
5. Modification of this MOU maybe made by the issuance of a written amendment(s), signed and dated by all Parties.
6. This is not a binding contract but is an MOU, which broadly states basic understandings between the Parties hereto of the tasks and methods for performing the tasks, described herein. The details of the levels of support to be furnished to one organization by the other with respect to funding shall be developed in specific interagency agreements or other agreements, subject to the availability of funds. This MOU shall not be used to obligate or commit funds or as the basis for the transfer of funds. This instrument does not establish authority for noncompetitive award of any contract or other agreement. Any contract or agreement for training or other service must fully comply with all applicable requirements for competition.
7. Any press releases that reference this MOU, or the relationship established between the Parties of this MOU, shall have prior approval of both Parties.
8. Periodic meetings of the Parties shall be scheduled to review progress and identify opportunities for advancing the understandings in this MOU. Collaboration under this MOU shall be in accordance with the applicable statutes and regulations governing the respective Parties.
9. In the event that a dispute arises between the Parties, whether programmatic or procedural, that could have clear, identifiable negative impacts for migratory birds covered by this MOU, the DOE site representative(s) responsible for administering this MOU and their FWS counterpart(s) shall contact DOE's Office of Dispute Resolution and/or FWS's Bureau Dispute Resolution Specialist, who will advise the Parties in determining whether a dispute resolution process, such as convening a mediation with a skilled, experienced mediator, would be appropriate. If

resolution can not be reached at the local level, either Party can elevate the issue to the appropriate officials at DOE and FWS Regional offices. In the event that there is no resolution at the Regional levels, the Parties may elect to elevate the dispute to the Washington, D.C. office of each agency.

10. This MOU does not require changes to current contracts, permits, or other third party agreements. The MOU recognizes that DOE may not be able to implement some elements of the MOU until such time as DOE has successfully included them in formal planning processes.
11. This MOU is intended only to improve the internal management of the Executive Branch of the Federal Government and does not create any right or benefit, substantive or procedural, separately enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.
12. The principal contacts for this MOU are as follows:

Leroy Banicki
Office of Air, Water and Radiation
Protection Policy and Guidance
U.S. Department of Energy
Room 3G-089
1000 Independence Ave., SW
Washington, D.C. 20585

Brian Millsap, Chief
Division of Migratory Bird Management
U.S. Fish and Wildlife Service
U.S. Department of the Interior
4401 N. Fairfax Drive,
MS 4107
Arlington, VA 22203

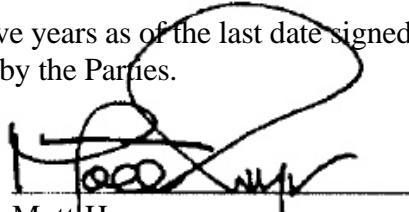
1. Effectiveness

1. *This Memorandum of Understanding Between the United States Department of Energy and the United States Fish and Wildlife Service Regarding Implementation of Executive Order 13180, "Responsibilities of Federal Agencies to Protect Migratory Birds"* shall become effective as of the date the last Party duly executes it below.
2. This MOU shall be effective for five years as of the last date signed below, unless extended or terminated in writing by the Parties.



Russell Shearer
Acting Assistant Secretary for
Environment, Safety and Health
U.S. Department of Energy

Date: July 12, 2006



Matt Hogan
Acting Assistant Secretary for
Fish, Wildlife and Parks
U.S. Department of Interior

Date: JUN 12 2006



Thomas D'Agostino
Deputy Administrator for Defense Programs
National Nuclear Security Administration

Date: August 3, 2006

Appendix

Definitions

action - a program, activity, project, official policy (such as a rule or regulation), or formal plan directly carried out by a Federal agency.

Birds of Conservation Concern - published by the Fish and Wildlife Services' Division of Migratory Bird Management, refers to the list of migratory and non-migratory birds of the United States and its Territories that are of conservation concern. The most current version of the list, Birds of Conservation Concern 2002, is available at <http://migratorybirds.fws.gov/reports/bcc2002.pdf>

Breeding Biology Research and Monitoring Database (BBIRD) - national, cooperative program that uses standardized field methodologies for studies of nesting success and habitat requirements of breeding birds (pica.wru.umt.edu/BBIRD/)

CFR - Code of Federal Regulations.

intentional take - take that is the purpose of the activity in question.

migratory bird - an individual of any species protected by the Migratory Bird Treaty Act. A list of migratory birds can be found in 50 CFR § 10.13, Code of Federal Regulations (www.gpoaccess.gov/cfr/).

Monitoring Avian Productivity and Survivorship (MAPS) - a voluntary-based program that uses the banding of birds during the breeding season to track the changes and patterns in the number of young produced and the survivorship of adults and young (www.birdpop.org/maps.htm).

North American Waterbird Conservation Plan (NAWCP) - a coalition of Federal and State government agencies, non-governmental organizations, and private interests focusing on the conservation of waterbirds, primarily marsh birds and colonial waterbirds (www.waterbirdconservation.org/pubs/ContinentalPlan.cfm).

North American Waterfowl Management Plan (NAWMP) - a coalition of Federal and State government agencies, non-governmental organizations, and private interests focusing on the conservation of waterfowl (www.fws.gov/birdhabitat/NAWMP/index.shtm).

National Environmental Policy Act (NEPA) - requires Federal agencies to prepare a detailed analysis of the environmental impacts of their proposal and alternatives and to include public involvement in the decision making process for actions significantly affecting the quality of the human environment.

Partners in Flight (PIF) - a coalition of more than 300 partners including Federal and State government agencies, non-governmental organizations, conservation groups, foundations, universities, and industry focusing on the conservation of land birds (www.partnersinflight.org).

site - a geographic entity comprised of land and the improvements thereon owned or leased by or for the account of the Federal government and under the control of DOE.

species of concern - refers to those species listed in the periodic report, *Birds of Conservation Concern*, published by the FWS Division of Migratory Bird Management (migratorybirds.fws.gov/reports/specon/tblconts.html); priority migratory bird species documented in the comprehensive bird conservation plans (North American Waterbird Conservation Plan, United States Shorebird Conservation Plan, Partners in Flight Bird Conservation Plans); species or populations of waterfowl identified as high, or moderately high, continental priority in the North American Waterfowl Management Plan; listed threatened and endangered bird species in 50 CFR 17.11; and MBTA listed game birds below desired population sizes (<http://www.fws.gov/migratorybirds/reports/reports.html>)

take - as stated in 50 CFR § 10.12 to include pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to pursue, hunt, shoot, wound, kill, trap, capture, or collect.

United States Shorebird Conservation Plan (USSCP) - an effort undertaken by a partnership of Federal and State government agencies, non-governmental organizations, and private entities to ensure stable and self-sustaining populations of all shorebird species are restored and protected (www.fws.gov/shorebirdplan/).